

General Communication with Tax Authorities in friendly or unfriendly ways

Tax Commission – of course...!

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National Report of Jersey

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1. Questionnaire

General assumption is discussions with the tax authorities regarding (corporate) income tax or indirect taxes. If a difference would apply in the treatment between either of these, please indicate in your report. Also, if there are different levels of tax authorities for different taxes or issues, please mark that in your report.

1.1 Communication general

How does the General Communication with the Tax Authorities take place?

a. Is a direct contact in between the tax payer and the Tax Authorities possible/common/advisable?

Ordinarily, individual and corporate taxpayers liaise with the Comptroller of Income Taxes (the "Comptroller") in Jersey, being the relevant tax authority, directly or through their accountant if applicable. It is common practice for tax returns to be filed by accountants engaged by taxpayers.

Lawyers do sometimes advise on matters of Jersey tax from a non-contentious perspective (often in relation to financial services law/ pensions matters), and also advise clients in circumstances where legal proceedings are ongoing (for example where proceedings have been issued by the Comptroller).

b. If not, does the communication only take place via tax counsels?

See a. above. The taxpayer will normally communicate and file tax returns with the Comptroller directly or accountants can be engaged to perform this function.

Jersey tax is relatively simple so there is not the market for "expert" tax counsel as there is in the UK for example. That said, tax is becoming more complex in Jersey with the introduction of a goods and sales tax, and more complex provisions on Jersey rentals and property developments and "deemed" dividends. In relation to Jersey structures holding foreign situate assets, it is market practice for tax advice to be sought from the jurisdiction where the assets are situate and/or where those intended to benefit from the structure are situate.

Lawyers might become involved on advisory or legal opinion work relating to Jersey tax, or if there are legal proceedings arising out of (a) criminal prosecution (for example failing to file tax returns); or (b) appeals or challenges of assessments made by the Comptroller (if those matters cannot be resolved outside of a Court process).

c. How can the communication regarding special matters be described?

It is common practice for the Comptroller and his department to correspond with taxpayers (both individuals and corporates) by written correspondence. The taxpayers, or their appointed professional advisors, in question can approach the Comptroller relatively informally to clarify any discrepancies or queries.

d. Does it take place only in a written form or are meetings possible?

Both forms are acceptable. The Comptroller's department would ordinarily contact taxpayers in writing, however face to face meetings can be arranged with taxpayers and their professional advisers thereafter.

e. Can the behaviour of the Tax Authorities in your country be described as all dominant, cooperative, customer-oriented or otherwise?

In relation to domestic tax matters, the Comptroller could be described as cooperative. Individuals and corporates are required to provide the relevant annual tax returns and forms, which are all easily available with supporting documentation by post and on www.gov.je/taxesmoney. Please see the relevant section below in relation to tax information exchange.

1.2 Agreements between tax payers and tax authority

a. Is there the possibility of a tax ruling and, if so, which costs can be expected?

It is common practice to obtain clearances and informal consents or views from the Comptroller (for example in relation to pension schemes). There is no standard scale of fees and for the most part there is no charge.

If a taxpayer is unhappy with their assessment of tax liability by the Comptroller, they are entitled to appeal, on giving notice in writing to the Comptroller, within 40 days of the notice of such assessment. Such appeals are heard before Commissioners, appointed pursuant to the Income Tax (Jersey) Law 1961.

In the case of an appeal against any assessment, the taxpayer must specify his/ her grounds of appeal. Should the taxpayer wish to raise any additional grounds of appeal at the hearing, which were not specified in the notice, and provided that the omission of those grounds were, in the opinion of the Commissioners, not wilful or unreasonable, the appellant may do so.

b. What is the average time frame to get a tax ruling done?

There must be at least 21 days' notice to the appellant before the hearing of any appeals. The time frame for when the hearing would take place would be largely dependent on the Court diary and the availability of the parties (the Comptroller must attend the hearing).

c. Are these consultations binding and, if so, which possible remedies do exist?

If either party is dissatisfied with the Commissioners' decision, they are entitled to require that the Commissioners conduct a further and final review of their findings.

If either party continues to be dissatisfied, and should they so wish, they are entitled to apply for a further appeal to the Royal Court in Jersey. The party wishing to appeal may give notice to the Commissioners of their intention to appeal.

The application must be brought before the Royal Court within 21 days, otherwise it shall be void and the determination by the Commissioners shall be final.

An alternative remedy if the above deadline lapses, is to pursue an application for judicial review of the decision of the Commissioners or the Comptroller as appropriate.

- d. Once a tax ruling between all the parties concerned has been achieved, can one rely on it?**

Unless an assessment is challenged, the taxpayer and Comptroller can rely on it.

- e. What is the exact legal status of a tax ruling?**

The rulings of the Commissioners are binding unless they are the subject of an appeal. If an appeal to the Royal Court is pursued, a judgment of the Royal Court, is viewed as a binding judgment.

- f. Is it common in order to get a tax ruling that the tax payer has to give up certain rights or explicitly agree to e.g. information exchange?**

Tax information exchange is addressed below. However, if an appeal is pursued to the Royal Court, this would become ordinary litigation, as such upon the determination of the matter, the taxpayer would have a publically available judgment which would name them and detail the matters in dispute.

There may be circumstances where a hearing is heard in private, but these are very limited.

- g. Is a tax ruling a public document or will it be treated confidentially by the tax authority? Does the taxpayer have an obligation to keep it confidential?**

Tax assessments are private. Rulings of the Commissioners are also not publically available. However, an appeal to the Royal Court will be publically available.

1.3 Remedies against decisions of the Tax Authorities

a. Is it common that one has to litigate if a decision has been made by the Tax Authorities and which remedies do exist?

See above

b. Is there the possibility of addressing a court or is this an administrative procedure?

At a hearing before the Commissioners, the taxpayer can address the court directly or through their legal representative.

The appellant and the Comptroller are entitled to:

- (a) give evidence;
- (b) call witnesses;
- (c) question any witnesses including other parties who give evidence; and
- (d) address the Commissioners both on the evidence and generally on the subject matter of the proceedings.

c. Which costs are to be expected in such a case?

It is highly difficult to assess costs for such a process, particularly if an appeal is taken to the Court of Appeal, where, if a taxpayer is unsuccessful, they may face costs orders against them in relation to the legal costs incurred by the Comptroller as the winning party.

d. Is it compulsory to have a lawyer in case of any remedy?

No - taxpayers may represent themselves if they so wish.

e. What timeframe can be expected in case of a remedy/litigation?

Again this is largely dependent on the availability of the parties and Court availability.

- f. Is it possible to postpone the payment of the tax debt as assessed by the tax authority until the end of a pending litigation with the tax authority? Will the tax authorities require guarantees for the postponement (Bank guarantees, mortgages etc.)?**

If a taxpayer is appealing an assessment, he is required to enter an estimate of the tax payable in the notice of appeal, including an explanation of this estimate where the appellant's estimate is that no tax is payable or a greater amount of tax is payable than the amount demanded in the assessment.

The tax estimated to be due is collected and paid as if it were tax charged by an assessment where no appeal was pending. Once the appeal has been determined, any balance of tax chargeable is then paid, or any tax overpaid is refunded as appropriate (where there is an overpayment, an interest payment is also attributed as part of the refund).

- g. Is it possible that the tax authorities submit a report to the public prosecutor to investigate on possible criminal tax offences and under what circumstances?**

Yes. If there are allegations of financial misconduct the Comptroller could refer the matter to the Attorney General for his investigation, and if thought relevant or appropriate, to prosecute.

- h. Is it possible to include a clause in an agreement to automatically amend this agreement in accordance with the outcome of a discussion or litigation with the tax authority (e.g. if an "at arms length payment" is not accepted as such by the tax authority or if interests are held to be dividends or a loan is seen to be a gift)?**

Any amendment to a contract would ordinarily require both parties' consent. The purpose and effect of any such clause would require careful consideration.

1.4 Sanctions

- a. What is the statute of limitations for tax related matters?**

Article 49 of the Income Tax (Jersey) Law 1961 provides that no claim may be made "*for repayment of income tax under this Law shall be allowed unless it is made within 5 years next after the end of the year of assessment to which it relates*". Therefore a taxpayer must bring a claim within 5 years.

Additionally, there is no all-embracing limitation statute in Jersey. Following the Court of Appeal decision in *JFSC v Black JLR 2002/168*, there is an indication that a statutory regulatory body with powers under public law has no applicable prescription period where the relevant statute pursuant to which it would be commencing proceedings does not prescribe one. There is no such limitation contained within the Income Tax (Jersey) Law, however that does not provide that the Comptroller would be able to linger indefinitely before commencing proceedings.

b. What is the typical sanction/amount of fines in your jurisdiction? Is there a different fine level for direct or indirect taxes?

There are scales for late filing fees and late payments. There are fines that range from £50 to £5,000 depending on the severity of the delays in filing and payments of taxes due.

c. Is it possible for a taxpayer to prevent tax penalties to be imposed should he/she be able to prove her good faith or reasonable interpretation of the law?

A taxpayer can always attempt to argue mitigating factors, however such mitigation will be determined on a case by case basis and might result in a reduction of penalties due.

d. Is it possible to regularize your tax situation with reduced or no fines/sanctions?

Throughout any period of assessment, if necessary, the taxpayer is able to liaise with and agree a settlement with the Comptroller as appropriate.

e. May tax advisors/tax lawyers be held responsible by the tax authority for their advice to taxpayers?

No - the tax advisors can be held liable by their clients for negligence or misconduct depending on the nature of the complaint. The tax authority would only consider the involvement of tax advisors if there are allegations of financial misconduct or criminal allegations, wherein the Comptroller would refer the matter to the Attorney General in Jersey for his investigation and prosecution if appropriate.

1.5 Tax information exchange

a. Does a tax information exchange on the EU level or OECD level happen and how does it take place?

Jersey is not part of the EU, but adheres to the principles of mutual assistance as set out in the OECD Model Tax Convention. As a result, Jersey has entered into numerous Tax Information Exchange Agreements ("TIEAs"), in order to comply with international standards of financial regulation, anti-money laundering and combating the financing of terrorism.

As at January 2014, Jersey has entered into over thirty TIEAs including the following countries: Australia, Austria, Brazil, Canada, China, Czech Republic, France, Germany, Norway, Portugal, Switzerland, Turkey, the United Kingdom and the United States of America.

The Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008, as amended, (the "Regulations"), sets out how each TIEA will operate, and the procedure for how information will be obtained in Jersey pursuant to requests made under the TIEAs. There is also a separate Taxation (United States of America) (Jersey) Regulations 2006, which governs the application of the TIEA between Jersey and the United States of America.

In Jersey, requests under the various TIEAs must be made to the Jersey competent authority, being the Comptroller of Taxes (the "Comptroller").

The taxes to which each TIEA applies are agreed between Jersey and the other country entering into each TIEA. The Comptroller must be satisfied, and the requesting authority must demonstrate, that the requested information is foreseeably relevant to the determination, assessment, enforcement or collection of tax or to the investigation of tax matters or prosecution of criminal tax matters.

Information is wide ranging and is defined in each TIEA as meaning "*any fact, statement, document or record in whatever form*". The Regulations provide that the information requested can be information within an individual's knowledge or belief, or recorded in a document or any other record in any format that an individual has in their possession, custody or control. Therefore recipients of notices issued by the Comptroller must be mindful of the extent of the information they retain (and in what form such information is held/ recorded), in order to ensure that they disclose all relevant information in compliance with any notices they receive.

A request for information which relates to a civil tax matter can only be made for matters arising on or after the date of execution of the TIEA in question. However, requests pertaining to criminal tax matters can be made for any period prior to or after the execution of the TIEA. This has been confirmed in the case of *Volaw Trust and Corporate Services Limited and Larsen v Office of the Comptroller of Taxes* [2013] JRC 095.

b. Does your country enter into tax treaties that oblige to exchange information spontaneously, automatically and/or upon request?

As per paragraph (a) above, the TIEAs and the Regulations envisage the exchange of information upon request.

The TIEAs set out the requirements which any requesting authority must comply with, such as the request being in writing and specifying certain details, including:

- the identity of the person under examination or investigation (the "Taxpayer");
- the period for which the information is requested (usually specified as specific tax years);

- the nature of the information requested and the form in which the requesting party would prefer to receive it;
- the tax purpose for which the information is sought;
- the reasons for believing that the information requested is foreseeably relevant to the tax administration and enforcement relevant to the Taxpayer;
- grounds for believing that the information requested is available in Jersey or is in the possession of or obtainable by a person within Jersey;
- a statement that the request conforms with the laws and administrative practice of the requesting party, that if the requested information was within the jurisdiction of the requesting party then the competent authority of the requesting party would be able to obtain the information under the laws of the requesting party or in the normal course of administrative practice and that the request is in conformity with the TIEA; and
- a statement that the requesting party has pursued all means available in its own territory to obtain the information, except where that would give rise to disproportionate difficulty.

If a request is not compliant with the above, the requested party may decline to assist. The *Larsen* case mentioned above confirmed that the Comptroller is entitled and able to ask the requesting authority *"for clarification or further information but is under no obligation to do so; nor is he under any obligation to require the production of evidence in support of facts of which he is informed in order to verify them for himself...it is not for him to reach any final conclusion on where the truth lies: his role is not to act as final adjudicator but simply to decide, having regard to the material before him, whether there are "reasonable grounds for believing""* that the information is foreseeably relevant.

Jersey has also entered into Inter-Governmental Agreements with UK and the US on 13 December 2013, though obligations arising on taxpayers and relevant individuals will not arise until 2015. However, this demonstrates a shift by the Comptroller towards automatic exchange of information.

c. Is the tax payer notified in case information is exchanged with foreign tax authorities?

In Jersey, once the Comptroller has decided to comply with a request, he issues a notice requesting the information in question. The notice can be issued directly to a taxpayer (if the Taxpayer in question is in Jersey), or to a third party in respect of a taxpayer. Those third party notices are typically issued to the Companies Registry, local banks and trust companies, or Jersey companies whose beneficial ownership is suspected as being the taxpayer in question.

If a third party notice is issued, the Comptroller must notify the taxpayer to which it relates within seven days of the notice being issued, together with providing them with a copy of the notice.

However, if the Comptroller is so minded, a prohibition can be imposed (applying to the third party and the Comptroller) which means that the taxpayer cannot be notified. Indeed, it is a criminal offence for a third party or its advisers to notify a taxpayer of a notice in respect of which a prohibition is imposed. The Comptroller is likely to impose such a prohibition if he believes (or the foreign tax authority in question informs him) that notification of the taxpayer would likely prejudice the assessment, enforcement, collection or investigation of tax matters.

d. Can the tax payer object against an exchange of information?

Yes. The Regulations set out the procedure by which the Comptroller would issue a notice to a taxpayer or a third party, and the procedure by which a taxpayer or third party may challenge a notice (and the grounds of challenge available to them).

On 6 November 2013, the Regulations were amended pursuant to the Taxation (Exchange of Information with Third Countries) (Amendment No. 7) (Jersey) Regulations 2013 (the "Amending Regulations") which introduced a number of substantive and material amendments to the Regulations.

In brief, a taxpayer or third party can challenge a notice by way of an application for Judicial Review of the decision of the Comptroller to issue the notice (i.e.

establishing that the Comptroller was acting illegally, irrationally, unreasonably or his decision making was procedurally improper).

However, the Comptroller is no longer required to provide the taxpayer (or therefore any third party served with a notice) with his "reasons" for issuing the notice. The tax payer or third party can only therefore commence an application based on the information derived from the notice itself.

Where a recipient of a notice wishes to challenge or appeal a notice, they must nonetheless comply with the notice and provide the Comptroller with a response and the information requested in the notice. If an appeal is commenced, the Comptroller would then be prohibited from providing the information to the foreign tax authority making the request until the application is determined or without the consent of the Court in Jersey;

Recipients of notices only have 15 days to provide the information requested, and any challenge to a notice must be made within 14 days of receipt of the notice.